

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE AND BRIEF OF THE UNITED STATES  
IN OPPOSITION TO MOTION TO DISCLOSE PLEA AGREEMENTS

I  
INTRODUCTION

Defendants have filed a *Motion to Disclose Plea Agreements and Brief in Support Thereof* (“Motion”) which asks this Court to require the United States to disclose to the defendants and their counsel: (1) any and all plea agreements between the government and any of its witnesses; (2) all documents setting out the full extent of the plea agreements; and (3) any document, portion of any report, or written or oral communication or motion notifying any probation officer or court of the extent and benefit of said witness’ cooperation with the government and the government’s position concerning the sentence to be given to said witness.

All of the information requested by defendants falls into one or more of the following categories: (1) defendants already have the information in their possession; (2) defendants have access to the information; or, (3) defendants are not entitled to the information. Defendants’ extremely broad requests should be denied either as moot, or because the defendants are not entitled to such documents.

## II LAW AND ARGUMENT

The defendants' request for all plea agreements and underlying documents the government has reached with its witnesses is based on their belief that the information has impeachment value. However, the United States understands its obligations under Brady/Giglio and has complied with those obligations, having already provided counsel for defendants with all Brady/Giglio material currently known to the government. On February 12, 2001, the government sent counsel for each defendant a letter which detailed information that might arguably be exculpatory or impeaching. Also produced to defendants were all immunity letters, proffer letters, and immunity orders related to the charged conspiracy. Although not requested in the Motion, defendants' memorandum in support mentions these types of documents.<sup>1</sup>

As the government's February 12, 2001 letter to each defendant informed them, the United States is aware of its continuing disclosure obligations under Brady and Giglio, and will notify the defendants promptly in the event that any further information is determined to fall within Brady or Giglio.

A. THE GOVERNMENT HAS PRODUCED ALL PLEA AGREEMENTS THAT ARE DIRECTLY OR INDIRECTLY RELEVANT TO THE CHARGED CONSPIRACY

Defendants' request (1) for any and all plea agreements between the government and any of its witnesses should be denied as moot. The United States has already turned over to defendants copies of the Plea Agreements, Informations, and Waivers of Indictment for C&S News Agency, Inc., Rack Shop (DE), Inc., and Island Periodicals, L.L.C. For each of these three

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<sup>1</sup> The government's response to defendants' request for these documents is laid out fully in *Response and Brief of the United States in Opposition to Motion to Disclose Grants of Immunity*, filed concurrently with this *Response*.

corporate defendants, also included was an Elements of the Offense and Factual Resume, laying out details of the crime. These are the only directly or indirectly relevant plea agreements concerning the charged conspiracy. These copies were provided by the United States as a courtesy to the defendants, as these are public records that the United States was under no obligation to obtain for the defendants.

Therefore, defendants have already received copies of all relevant plea agreements, Brady and Giglio information, and so defendants' request (1) for any and all plea agreements between the government and any of its witnesses should be denied as moot.

B. THE PLEA AGREEMENTS PRODUCED TO  
THE DEFENDANTS CONSTITUTE THE ENTIRETY OF THE  
AGREEMENT BETWEEN THE GOVERNMENT AND THE DEFENDANTS

Defendants' request (2) for all documents setting out the full extent of the plea agreements should also be denied as moot. Each of the named plea agreements contain a clause, Entirety of Agreement, which states that the plea agreement forms the entirety of the agreement between the United States and the named defendant. In the C&S plea agreement, paragraph 20 reads:

This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the charges in this case. The United States has made no other promises to, or agreement with, the defendant, or Mark A. Cohen, relating to allocating territories or customers, or other restraints of trade, in the magazine and periodical distribution industry. This Agreement cannot be modified other than in writing signed by the parties.

Rack Shop and Island Periodicals, although separate cases, were covered by only one plea agreement. In their plea agreement, paragraph 21, Entirety of Agreement, reads:

This Plea Agreement constitutes the entire agreement between the United States and Defendants concerning the disposition of the charges in these cases. This Agreement cannot be modified other

than in writing signed by the parties.

Neither of the above plea agreements has been modified by the parties. Therefore, defendants' request (2) for all documents setting out the full extent of the plea agreements should also be denied as moot because the defendants have the plea agreements, and the plea agreements form the entirety of the agreement between the named defendants and the United States. The defendants are not entitled to "all" other documents setting forth the entirety of the plea agreement, discussed infra.

C. THE PLEA AGREEMENTS PRODUCED TO THE DEFENDANTS WERE USED TO NOTIFY THE COURT AND THE PROBATION OFFICER OF THE DEFENDANT'S COOPERATION AND THE GOVERNMENT'S POSITION CONCERNING THE SENTENCE TO BE GIVEN TO THE DEFENDANT

Defendants' request (3), for any document, portion of any report, or written or oral communication or motion notifying any probation officer or court of the extent and benefit of said witness' cooperation with the government and the government's position concerning the sentence to be given to said witness, should also be denied as moot. Both plea agreements, which were provided to both the court and the probation officer, contain a clause, Sentencing Agreement, which lays out the joint recommendations of the United States and the defendants regarding the sentence to be imposed. C&S News' plea agreement also contains a clause, Defendant's Cooperation, which describes the nature and extent of the defendant's cooperation. Similarly, the plea agreement covering both Rack Shop and Island Periodicals contains a clause which describes the nature and extent of the defendants' cooperation, Defendants' Cooperation. Therefore, as stated above, because the defendants are already in possession of the requested plea agreements, this portion of their request should be denied as moot.

D. DEFENDANTS ARE NOT ENTITLED  
TO INTERNAL GOVERNMENT DOCUMENTS

To the extent that defendants' request (2) for all documents setting out the full extent of the plea agreements seeks internal government documents, defendants clearly are not entitled to those documents. Federal Rule of Criminal Procedure 16(a)(2) protects from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case." Any internal documents or memoranda between the prosecutors and their superiors regarding the requested plea agreements clearly fits within this category and so defendants are not entitled to these documents.

E. DEFENDANTS ARE ALREADY IN POSSESSION OF ALL PUBLIC  
DOCUMENTS SUBMITTED TO THE COURT REGARDING THE  
DEFENDANT'S COOPERATION AND THE GOVERNMENT'S POSITION  
CONCERNING THE SENTENCE TO BE GIVEN TO THE DEFENDANT;  
ORAL COMMUNICATIONS WITH THE COURT ARE PUBLIC RECORDS

Defendants' request (3) for any document, portion of any report, or written or oral communication or motion notifying any court of the extent and benefit of said witness' cooperation with the government and the government's position concerning the sentence to be given to said witness should be denied as moot.

1. Documents Submitted To The Court

The only public documents submitted to the court regarding these topics were the plea

agreements.<sup>2</sup> As noted above, the plea agreements contain clauses regarding the extent and nature of the defendants' cooperation as well as a sentencing recommendation.

2. Oral Communications With The Court

The only oral communications notifying the Court of the extent and benefit of each defendants' cooperation with the government and the government's position concerning the sentencing took place at sentencing. Defendants' request (3) seeks the transcripts of the sentencing proceedings in each of the cases. The United States does not have a copy of any sentencing transcripts for any of these three cases. These transcripts are public records, and therefore the defendants are able to obtain a copy themselves should they choose to do so. The United States has no obligation to provide defendants with information that is equally available to both. United States v. McKenzie, 768 F.2d 602 (5th Cir. 1985) (citations omitted), cert. denied, 474 U.S. 1086 (1986). As the Court explained:

Brady does not oblige the government to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence. When evidence is available equally to the defense and the prosecution, the defendants must bear the responsibility of their failure to diligently seek its discovery.

Id. at 608.

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<sup>2</sup> The plea agreement covering Rack Shop and Island Periodicals states that "the United States agrees to file a Motion before sentencing pursuant to U.S.S.G. § 8C4.1 requesting that the Court depart from the sentences calculated pursuant to the Sentencing Guidelines and impose the agreed-upon sentence set out in Paragraph 6, above." Plea Agreement, Sentencing Agreement, ¶ 9 (emphasis added). The United States filed the § 8C4.1 Motion under seal. Because it is not a public document, this Motion was not disclosed to defendants. However, as noted, the United States' sentencing recommendation was set out in the plea agreement itself. Defendants have the information they need to successfully cross examine government witnesses.

F. DEFENDANTS ARE NOT ENTITLED TO INFORMATION SUBMITTED TO THE PROBATION OFFICER OTHER THAN THE PLEA AGREEMENTS THEMSELVES

Defendants' request (3) for any document, portion of any report, or written or oral communication or motion notifying any probation officer of the extent and benefit of said witness' cooperation with the government and the government's position concerning the sentence to be given to said witness should be denied because the defendants are not entitled to these documents.

The probation officer, like the Court, was given a copy of the plea agreements. As stated above, the plea agreements lay out the extent and benefit of each corporate defendants' cooperation with the government and the government's position concerning sentencing. Defendants have the information they requested.

In their broad request, the defendants seemingly want access to information underlying the probation officer's report. Courts have held that even the criminal defendants themselves are not entitled to information underlying a probation officer's report about them. See United States v. Giannetta, 909 F.2d 571, 580-81 (1st Cir. 1990) (criminal defendant has no right to notes and records made in preparing medical and psychological evaluation that was incorporated into presentence report); United States v. Radix Lab., Inc., 963 F.2d 1034, 1038-39 (7th Cir. 1992) (no right to affidavits from defendant's employees when 12-paragraph summary of affidavits appeared in PSI; only material in PSI must be disclosed to defendant).

Here, as third-party criminal defendants, neither Martin News Agency nor Bennett Martin is entitled to the information underlying someone else's presentence report. Third-party rights regarding access to the presentence reports themselves is much more limited than for the named

criminal defendant. See, e.g., United States Department of Justice v. Julian, 486 U.S. 1, 12 (1988) (“[T]he courts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals.”).<sup>3</sup> The defendants cite no case law that supports their request for third-party access to the information underlying a presentence report.<sup>4</sup>

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<sup>3</sup> For a fuller discussion of third-party access to presentence reports, please see *Response and Brief of the United States in Opposition to Motion to Disclose Presentence Reports*, filed concurrently with this response.

<sup>4</sup> Instead, the defendants have cited cases which state that the right of confrontation should not be limited by the trial judge. Even on this topic, which is seemingly unrelated to their Motion, at least one of defendants’ cited cases contradicts their implied assertion that a defendant is entitled to cross examine a witness about every possible impeaching topic. In United States v. Mallah, 503 F.2d 971 (2<sup>nd</sup> Cir. 1974), cert. denied, 420 U.S. 995 (1975), the appellate court held that the trial court had not committed error when it excluded cross examination of two government witnesses regarding crimes each had been involved in, with one of the bases for its holding being that the evidence would have been cumulative.



IV  
CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to deny defendants' Motion.

Respectfully Submitted,

SCOTT M. WATSON  
Chief, Cleveland Field Office

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“/s/”  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

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